84-1508

No.

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ALEXANDER L. STEVAS
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HARVIS CONSTRUCTION, INC., SEABOARD SURETY COMPANY, and THE HOME INSURANCE COMPANY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
For the Use and Benefit of
MARTIN STEEL CONSTRUCTORS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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28pp

QUESTION PRESENTED FOR REVIEW

In a case arising out of the Miller Act[1] involving a contract entered into and performed between Hawaiian parties, was it proper for the courts below to deny appellant the benefit of local law by refusing to interpret the contract under the law of the State of Hawaii?

---

[1]40 U.S.C. Section 270(a-d).

PARTIES

Defendant/Petitioner Harvis Construction, Inc. ("Harvis") appealed from the Amended Judgment in Favor of Use plaintiff/appellee Martin Steel Constructors, Inc., ("Martin Steel") filed June 10, 1983, and issued by the United States District Court for the District of Hawaii (CR 74). Said Judgment is based on said District Court's Order Granting Summary Judgment dated May 21, 1982 (CR 55) and Judgment Thereon (CR 56).

This action was brought under the Miller Act, 40 USCA §§ 270a-270d. The case involves the construction of an electric shop addition to a building located at the Pearl Harbor Naval Shipyard at Honolulu, Hawaii, for the United States Navy. Harvis was the general contractor on the project. Harvis entered into a subcontract with defendant Avanti Constructors, Inc. ("Avanti") whereby Avanti agreed to perform the steel work. Avanti, in turn, contracted with Martin Steel to help Avanti fulfill its legal obligations to Harvis by providing and furnishing the steel related materials for Avanti's steel subcontract.

The contract between Avanti and Martin Steel is an Avanti purchase order dated May 17, 1977. A copy of the purchase order is "Exhibit A" to Martin Steel's Motion for Summary Judgment (CR 48).

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is printed in Appendix A ((9 Cir. 1984) ..... F.2d .....). The Order of the district court granting summary judgment is printed in Appendix D (p. A-13).

JURISDICTION

The basis for subject matter jurisdiction of this Miller Act case in the district court is 40 U.S.C. Section 270(a-d). The opinion of the Court of Appeals for the Ninth Circuit was entered on December 28, 1984. A rehearing was sought and denied on January 31, 1985.

STATEMENT OF THE CASE

The present action was brought by Martin Steel against Avanti for breach of contract, and against Harvis and its sureties under the Miller Act, 40 USCA §§ 270a-270d, to recover monies allegedly due for supplying the steel materials called for on the project.

No appearance was entered by Avanti after service of the Complaint, and its default was taken by use plaintiffs. Avanti filed bankruptcy on May 13, 1982.

On or about June 18, 1979, Harvis and its sureties, defendants Seaboard Surety Company and The Home Insurance Company, answered the Complaint, putting in issue the factual allegations that Martin Steel now claims are "undisputed", including the allegation that Martin Steel delivered the materials as called for pursuant to the proper plans and specifications. Harvis also counterclaimed against Martin Steel. By the counterclaim, Harvis sought damages caused as a result of extraordinary delay by Martin Steel and its supplier, Miscron, in the delivery of essential structural steel to Avanti, misfabrication of crane support steel and omission of work to be performed under the contract specifications.

As a result of Martin Steel's defective performance, the United States Navy delayed acceptance of the work. Harvis had to correct deficiencies and performed work which Martin Steel failed to do. Harvis was prevented from the timely completion of its prime contract. The damages to Harvis included its direct cost resulting from the overall delay; its exposure to liability for liquidated damages under the prime contract and its expenses and liability incurred in correcting and completing the work which Martin Steel was required to perform before entitlement to the payment sought here. These damages to Harvis are stated in the Affidavit of Clark B. Morgan, Jr., filed with Harvis' Memo-

randum in Opposition to Motion for Summary Judgment, and supported by documents attached thereto.

On April 16, 1982, Respondent filed its Motion for Summary Judgment. In its Memorandum in Support for Motion, plaintiff argued that all it had to show in order to obtain summary judgment was that it supplied materials for the project and that it had not been fully paid.

In its Memorandum in Opposition to Motion for Summary Judgment, Harvis asserted that summary judgment could not be granted because there were disputed material issues of fact. These issues were 1) whether or not Martin Steel performed its contract with Avanti by providing goods which conformed to the project plans and specifications, and 2) the nature and extent of the set-off (not counterclaim) damages incurred by Harvis as a result of Martin Steel's failure to provide conforming goods. Harvis argued that Martin Steel was required to prove performance as a matter of law by undisputed evidence that the goods supplied conformed to the project plans and specifications for steel established in Harvis' contract with the United States Navy. These project specifications are expressly incorporated as requirements of Avanti's contract with Martin Steel. The Affidavit of Clark B. Morgan and the correspondence attached thereto show a history of complaints that Martin Steel delayed its performance and supplied defective goods which had to be corrected at Harvis' expense.

The District Court granted the Motion for Summary Judgment, ruling that since Harvis was not in privity of contract, that it could assent no defense to respondent's claim. The Court of Appeals approved this reasoning relying on a Louisiana case and applying Louisiana law.

REASONS FOR GRANTING CERTIORARI

This case involves Miller Act claims which are frequent and widespread and significant both in amount and in the

need for uniform treatment by the Circuits. The Ninth Circuit, by affirming the summary judgment of the district Court and by following the district court's reasoning, has misapplied the law which should be applicable in *all* Circuits of the United States: that the law of the state wherein the contract is entered and to be performed should govern the rights and duties of the parties. The Ninth Circuit Court of Appeals has refused to allow Harvis a defense to the merits of the Miller Act claim because it was not in privity of contract with the respondent. The law of the State of Hawaii *clearly* does not require privity of contract.

THE NINTH COURT OF APPEALS MISTAKENLY APPLIED THE LAW OF LOUISIANA TO DENY HARVIS' CLAIM FOR RIGHT OF SET-OFF

Harvis contended that the facts and the record showing late and defective shipments were a basis of a separate defense of set-off. The Court rejected Harvis' assertion that it was entitled to a set-off based upon the case of *United States ex rel. A & W Concrete Building Materials v. A. P. Johnson Contractor, Inc.*, 225 F.Supp. 727, 729 (E.D. La. 1964). This was a Louisiana decision wherein the Court stated, applying Louisiana law, at Page 729:

> "First, set-off or compensation takes place only between two debts which are equally liquidated and demandable. The law of Louisiana is explicit in this regard.[1] The debt asserted by A & W is fixed and certain and therefore liquidated.[2] A certain amount of cement, at a certain price, was delivered and poured. The invoices, signed dray tickets and affidavits submitted prove the existence of a debt to A & W, and the evidence is uncontradicted. On the other hand, the alleged claim of Harris-Smith does not meet this test; it is contested and not capable of exact ascertainment, based as it is on damages claimed because of an alleged

breach of contract occasioned by delays, insufficiency of deliveries and other allegations not capable of proof promptly and summarily.[3]

[1]LSA-C.C. art. 2209.

[2]Olinde Hardware & Supply Co. v. Ramsey, La. App. 1 Cir., 98 So.2d 835 (1957).

[3]Saunier v. Saunier, 217 La. 607, 47 So. 2d 19 (1950); Spencer v. West, La.App. 2 Cir., 126 So.2d 423 (1960); City of Shreveport v. Curcio, La.App. 2 Cir., 157 So. 317 (1934)."

The District Court's conclusion that the Miller Act did not envision a defense of set-off was, therefore, completely superfluous to the law of the case since, under the applicable law of Louisiana, a defense of set-off would not be applicable in any event.

It has long been established in Miller Act cases that state law is to be applied. In the case of *United States ex rel. Arlmont Air Condition Corp. v. Premier Contractors, Inc.*, 283 F.Supp. 343 (N.D. Me. 1968) cited by the Court on Page 9 of its Opinion, it is clearly stated that local law, in that case the law of Maine, was applicable to Miller Act cases. At Page 348 the Court stated:

"According to the law of Maine, which is here applicable,[7] a defaulting contractor whose breach is not wilful and who has in good faith supplied a net benefit to another party is entitled to recover in *quantum meruit* the net benefit conferred."

"[7]In actions brought under the Miller Act, state law is applied to determine the substantive rights of the parties under their contracts. United States for Use and Benefit of Shields, Inc. v. Citizens and Southern National Bank of Atlanta, 367 F.2d 473, 477 (4th Cir. 1966); Central Steel Erection Co. v. Will, 304 F.2d 548, 554 (9th Cir. 1952); United States for Use and Benefit of Greenville Equipment Co. v. United States Casualty Co., 218 F. Supp. 653, 656-657 (D.Del. 1962); cf. American Auto Ins. Co. v. United States, 289 F.2d 406, 411-412 (1st Cir. 1959). In the present case, where the contract was to be performed in Maine and

where suit is brought in the District of Maine, the law of Maine determines the sufficiency of performance as well as questions of damages and remedy. E. g. Katz v. Gordon Johnson Company, 160 F. Supp. 126 (D.Me. 1958)."

Under the law of the State of Hawaii, the defense of set-off in circumstances of this case is clearly recognized. In Hawaii, under the facts of this case, the defense would be termed "recoupment", rather than "set-off". *Pacific Concrete F.C.U. v. Kauanoe*, 62 Haw. 334, 338; 614 P.2d 936:

DOCTRINE OF RECOUPMENT

The term "recoupment" developed under principles of common law and described a claim that defendant could assert against plaintiff only if it arose from the same transaction as plaintiff's claim. It is in the nature of a defense and can only be asserted to reduced, diminish or defeat the plaintiff's claims. A unique characteristic of common law recoupment is that it permits the defendant to raise a claim without regard to the statute of limitations which would apply if the defendant brought an affirmative action on the same claim. WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil Section 1401 (1971).

Hawaii has recognized "recoupment" in a number of cases distinguishing it from "set-off" which arises out of a separate transaction, unrelated to plaintiff's claim. Hong Hoon v. Lum Wai, 26 Haw. 546 (1922); Oahu Railway Co. v. Waialua A. Co., 16 Haw. 520 (1905); Erickson v. Volcano Stables and Transportation Co., 13 Haw. 428 (1901)."

The Court, mistakenly, concludes that in order to assert a set-off defense, that Harvis must be in privity of contract with Martin. The Court states throughout the Opinion that there was admittedly a defective and late performance of the contract, but asserts there is no right of a set-off

defense by reason of these damages because of lack of privity as between Martin and Harvis.

The contract in question is governed by the Uniform Commercial Code, Hawaii Revised Statutes, Section 490. The privity of requirement therein is governed by Haw. Rev. Statute 490: 2-318. The State of Hawaii chose to adopt the most liberal version in 1965. Section 490:2-318, Third Party Beneficiaries of Warranties Express or Implied, provides as follows:

> "A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends."

This is Alternative C of the Uniform Commercial Code. It is the most liberal version and extends the scope of the warranty to any person who may reasonably be expected to use, etc., as distinguished from family or household of the buyer. The version C also extends the scope of the warranty to any type of injury as distinguished from personal injury. See 1966 amendments: 1A U.L.A. (Uniform Laws Annotated Master Edition, Section 2-318). See also 3 Anderson 3d, Sec. 2-318:2.

The law of the State of Hawaii clearly extends the benefits of the Uniform Commercial Code to a party beyond the scope of the immediate seller and purchaser. *Ontani v. Straub Clinic and Hospital,* 659 P.2d 734 (Haw. 1983), at Page 743:

> "Ontai's third cause of action against G.E. is based on the theory of implied warranty. Although Ontai was not in privity with G.E. in the sale of the X-ray table and footrest, the warranty to Straub from G.E. extends to Ontai by statute, as a third party beneficiary; see HRS Section 490:2-318."

CONCLUSION

The Court has found that Martin made non-confirming deliveries, yet deprived Harvis of its day in court. It is ironic that even counsel for Martin in opposing the Harvis Third Party Complaint (hearing before Judge Curtis, Nov. 6, 1981), transcript page 9, stated:

Mr. MacDonald (for Martin Steel):

> "With regard to the merits of the argument, I think we first have to distinguish between defenses available to the prime contractor and the bonding companies, and a separate claim for damages. I think we've confused here the defense of set-off with an affirmative claim; and, in this case, the contract is rather stark. I don't know what the exact—I forget what the exact prayer of Martin Steel is in this case, but it is substantially less than the claims counterclaimed by the general contractor.
>
> *Certainly, we would have no quarrel with the argument that the general contractor is entitled to plead set-off as an affirmative defense . . .*" (emphasis added.)

Harvis was deprived of the very defense that even respondent conceded they had.

It is most respectfully submitted that this Court should grant Certiorari.

Dated: March 22, 1985

Respectfully submitted,

HINES & THOMAS
ROBERT L. HINES
Attorneys for Petitioner

(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 83-2129
D.C. No. C-79-0159

United States of America, for the use and benefit of
Martin Steel Constructors, Inc.,
Plaintiff-Appellees,

vs.

Avanti Constructors, Inc.,
Defendant,
and
Harvis Construction, Inc., Seaboard Surety Company,
and The Home Insurance Company,
Defendants-Appellants.

[Filed Dec. 28, 1984]

Appeal from the United States District Court
for the District of Hawaii
The Honorable Helen J. Frye, District Judge, Presiding
Argued and submitted November 7, 1984

Opinion

Before: Hug, Tang and Schroeder, Circuit Judges.
Tang, Circuit Judge:

I. Overview

Defendant Harvis Construction, Inc. (Harvis), appeals the district court's grant of summary judgment in favor of use plaintiff Martin Steel Construction, Inc. (Martin). Martin brought suit under the Miller Act, 40 U.S.C. § 270(a-d),

for unpaid amounts due on its contract to supply steel materials to subcontractor Avanti Construction, Inc. (Avanti). Harvis maintains that summary judgment was improper because Martin failed to prove its prima facie case, and also because the district court erred in not allowing Harvis a set-off defense. These assertions are based on evidence showing that Martin made late and non-conforming deliveries to Avanti. We reject Harvis' assertions of error and affirm the summary judgment.

II. Facts

Harvis was the general contractor for the construction of an electric shop addition to a building at the Pearl Harbor Naval Shipyard, Honolulu, Hawaii. In accordance with 40 U.S.C. § 270a, Harvis executed a bond, accepted by the United States, to protect material and labor suppliers working on the project.

Harvis then entered into a subcontract with Avanti, wherein Avanti agreed to perform the steel work at the site. Avanti entered into a contract with Martin for supply of steel-related materials to be used in its subcontract. The contract is a purchase order dated May 17, 1977.

In accordance with the contract, Martin supplied steel materials eventually used in the project. Affidavits and correspondence in the record show that many of the shipments from Martin to Avanti were delayed and/or defective. Avanti encountered financial difficulties, failed to complete its work and failed to pay Martin for all shipments made under the contract. Although some required repair or alteration, all goods delivered by Martin undisputedly were used in the project.

On April 11, 1979, Martin filed suit against Avanti, Harvis, and Harvis' sureties under the Miller Act, 40 U.S.C. § 270a-b, to recover on Harvis' bond the amounts owed by

Avanti to Martin. Harvis answered and counterclaimed against Martin for damages resulting from alleged delays and defective shipments to Avanti, but allegedly damaging Harvis. Avanti never answered, and default judgment was entered against it on July 10, 1979. In May 1982, Avanti filed bankruptcy and was dismissed by Martin from this suit.

In December, 1980, Martin moved for judgment on the pleadings on Harvis' counterclaim. After a hearing, Judge Curtis originally denied the motion, but on April 10, 1981 granted the motion to dismiss the counterclaim. Judge Curtis based the dismissal on the lack of privity between Harvis and Martin, finding it a bar to Harvis' affirmative contract claim. Harvis attempted to appeal this dismissal, but filed prematurely; the dismissal of the counterclaim has subsequently never been appealed. Harvis' attempt to amend its counterclaim was denied after a hearing by a magistrate.

On April 16, 1982, Martin filed the motion for summary judgment in this case. Martin claimed that under the Miller Act it was entitled to monies owed for materials supplied under its contract with Avanti as a matter of law. Judge Frye entered an Order granting the motion on May 21, 1982. Harvis appeals the summary judgment based on its contention that genuine issues of material fact exist, and that Harvis has a set-off defense not precluded by the dismissal of its counterclaim.

III. Discussion

A. Standard of Review.

We review the grant of summary judgment under the same standard as the trial court; after viewing the evidence, de novo, in the light most favorable to Harvis, we must determine whether the trial court correctly found that there was no genuine issue of material fact and that the

Martin was entitled to judgment as a matter of law. Ward By & Through Ward v. United States Dept. of Labor, 726 F.2d 516, 517 (9th Cir. 1984).

B. Prima Facie Case

The Miller Act, 40 U.S.C. § 270a(a)(2), requires a general contractor on a federal project to post a bond to protect those who supply labor or materials for the project. The act allows a subcontractor's materials supplier to bring suit on the bond for any unpaid amounts owing for labor or materials, even if no contractual relationship exists between the general contractor and the supplier. 40 U.S.C. § 270b(a). The purpose of the Act is to protect persons supplying materials and labor for federal projects, and it is to be construed liberally in their favor to effectuate this purpose. F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc., 417 U.S. 116, 124 (1974).

The district court entered summary judgment in Martin's favor, holding that Martin, as a materials supplier, was entitled to collect unpaid amounts under its contract with Avanti, the subcontractor, as a matter of law. In order to prevail under section 270b of the Miller Act, a material supplier need only prove four elements:

> (1) the materials were supplied in prosecution of the work provided for in the contract;
>
> (2) he has not been paid.
>
> (3) he had a good faith belief that the materials were intended for the specified work; and
>
> (4) the jurisdictional requisites were met.

United States ex rel. Carlson v. Continental Casualty Co., 414 F. 2d 431, 433 (5th Cir. 1969) (affirming summary judgment for material supplier).

The record in this case shows that Martin supplied materials for use at the Navy project, and that Avanti failed to pay Martin for all the goods delivered. Additionally,

Martin's good faith belief as to the use of goods is not at issue, since it is undisputed that all goods supplied were eventually used in the project. Finally, Martin undisputedly met the jurisdictional requirements of timely notice and filing under § 270b(a). Under the Continental Casualty standard, Martin has made its required showing, and the district court correctly awarded summary judgment in its favor.

Harvis maintains that in addition to the elements of proof enumerated in Continental Casualty, materialmen claiming under the Miller Act must affirmatively prove compliance with the terms of the contract with the subcontractor. See, e.g., Jefferson Construction Co. v. United States ex rel. Bacon, 283 P.2d 265 (1st Cir. 1960), *cert. denied,* 365 U.S. 835 (1961) (failure to plead or prove compliance with underlying contract and fulfillment of conditions precedent therein precluded summary judgment); United States ex rel. Foster Wheeler Corp. v. American Surety of N.Y., 142 F.2d 726, 728 (2d Cir. 1944) (subcontractor and general contractor's stipulation as to balance owing under contract did not relieve subcontractor of burden to prove it performed its contract); United States ex rel. Purity Paint Products Corp. v. Aetna Casualty & Surety Co., 56 F.Supp. 431, 434 (D.Conn. 1944) (supplier of paint to subcontractor must prove paint furnished was in accordance with contract terms requiring paint to conform to specifications of principal contract where subcontractor rejected shipments). Relying on these authorities, Harvis maintains that summary judgment was improper because the record contains evidence that Martin made late and nonconforming deliveries.

Harvis' reliance on this line of authority is misplaced, as these cases requiring proof of compliance with contract terms beyond delivery and acceptance of goods are factually distinguishable from our case. Here, we are considering a

simple contract for sale of goods, where none of the deliveries were rejected; although the record contains evidence of late and nonconforming deliveries, Avanti accepted the materials and they were undisputedly used in the project.

In contrast, the cases relied on by Harvis involve factual situations wherein proof of compliance with specific contract terms beyond delivery and acceptance was necessary to resolve legal issues in the case. For example, Purity Paint involved a situation where paint shipments had been rejected upon delivery as not in conformity with project specifications. 56 F. Supp. at 434. Thus, the material supplier's compliance with specific contract provisions regarding paint quality was clearly necessary to resolve the case. Similarly, in Foster Wheeler, the dispute centered around the cause of a failure in brick walls where the materialman had supplied the bricks a year earlier. 142 F.2d at 727. Thus, the conformity of the bricks to specifications was clearly relevant.

Jefferson Construction also contains broad language suggesting that under the Miller Act a plaintiff must affirmatively prove its compliance with the underlying contract. 283 F.2d at 267. But again, Jefferson Construction involves facts not present in our case; the contract involved explicit conditions precedent to payment, beyond delivery of goods:

> the "contract price is subject to the final measured quantities * * * . . . Ten percent (10%) of the total amount of this contract shall be retained by the Contractor until final acceptance and approval by the General Contractor and Architect and Owner. * * * Before final payment * * * the Subcontractor shall furnish * * * receipted invoices * * * that all labor and bills of all nature for this project have been paid in full * * *."

Id. The court explicity relied on these conditions and stated that requiring proof of the contract in the absence of such conditions might be "superfluous". Id.

In the present case, the contract consisted of a simple purchase order, specifying the goods ordered and providing for a lump sum payment. It did not contain any conditions similar to those in the contract in Jefferson Construction. On our facts, Martin undisputedly delivered the goods under the contract, and the four requirements of Continental Casualty are met. On the facts of this case, no other proof is needed to succeed on a Miller Act claim. Finding no genuine issue of material fact as to any of the four required elements, we hold that Martin was entitled to judgment as a mater of law, and affirm the summary judgment.

C. Set-Off Defense

Harvis further relies on the facts in the record showing late and defective shipments as the basis for its second asserted error, that it is entitled to a separate defense of set-off. Although Avanti's trustee in bankruptcy may have a contract action against Martin for alleged breach of their contract, the district court, Judge Curtis, ruled that Harvis does not have such a claim against Martin because there is no privity of contract between Harvis and Martin. This was determined in the dismissal of Harvis' counterclaim, which is not on appeal in this action.

We reject Harvis' assertion that it is entitled to assert a set-off defense, notwithstanding Judge Curtis' ruling. Cases allowing a defense of set-off are limited to those in which the plaintiff is a subcontractor or materialman of the general contractor and thus is in direct contractual relations with the counterclaimant. See, e.g., United States ex rel. Johnson v. Morley, 98 F.2d 781 (2d Cir. 1938) (allowing counterclaims for set-off against plaintiffs in privity with

general contractor, but denying set-off against party not in privity); United States ex rel. Kashulines v. Thermo Contracting Corp., 437 F. Supp. 195 (D.N.J. 1976); United States ex rel. Arlmont Air Condition Corp. v. Premier Contractors, Inc., 283 F. Supp. 343, 348-49 (N.D. Maine 1968).

In United States ex rel. A. & W. Concrete and Building Materials, Inc. v. A. P. Johnson Contractor, Inc., 225 F. Supp. 727, 729 (E.D. La. 1964), the court explicitly held that a claim to set-off arising out of a contract to which the general contractor was not a party is personal to the contracting parties. The defense of set-off was not allowed; the court found that the Miller Act did not envision such a defense. Id. We find that a set-off defense is not available in a Miller Act claim in the absence of privity. The Act was created for the protection of those in Martin's position, and allowing a set-off defense by a general contractor not in privity with Martin would unduly burden the enforcement of the rights created by the Act.

Furthermore, although Harvis may incur losses as a consequence of Martin's alleged defective deliveries, Harvis' complaint, if any, would seem to be against its subcontractor Avanti. Indeed, Harvis was in the best position to protect itself against Avanti's potential bankruptcy.

> [T]he prime contractors could easily have secured themselves against loss by requiring the subcontractor to give security by bond or otherwise for the payment of those who contracted directly with the subcontractor. After all, the prime contractor selects his own subcontractors and it seems not unjustly harsh that he should be holden for their laxities.

Glassell-Taylor Co. v. Magnolia Petroleum Co., 153 F.2d 527, 530-31 (5th Cir. 1946).

IV. Conclusion

Harvis has failed to raise a genuine issue of material fact as to the required showing for a successful Miller Act claim. Absent privity of contract, a separate defense of set-off is not available. Accordingly, the summary judgment in Martin's favor is AFFIRMED.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 83-2129

D.C. No. C-79-0159

United States of America, for the use and benefit of
Martin Steel Constructors, Inc.,
Plaintiff-Appellees,

vs.

Avanti Constructors, Inc.,
Defendant,
and
Harvis Construction, Inc., Seaboard Surety Company,
and The Home Insurance Company,
[Filed Jan. 31, 1985]

Before: Hug, Tang and Schroeder, Circuit Judges.

Order

The court has considered the Petition for Rehearing. The Petition for Rehearing is denied.

Appendix C

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Attorneys for Plaintiff

In the United States District Court
for the District of Hawaii

Civil No. 79-0159

United States of America, for the use and benefit of
Martin Steel Constructors, Inc.,
Plaintiff,

vs.

Avanti Constructors, Inc., Harvis Construction, Inc.,
Seaboard Surety Company, and The Home
Insurance Company,
Defendants.

[Filed June 4, 1982]

Judgment

This Matter having come on for hearing before the Honorable Helen J. Frye, District Judge, on May 21, 1982, on Use-Plaintiff Martin Steel Constructors, Inc.'s Motion for Summary Judgment, and the Court having granted said motion;

And this Court being otherwise fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that judgment be entered in favor of Use-Plaintiff Martin Steel Constructors, Inc. and against Defendants Harvis Construction, Inc., Seaboard Surety Company, and The Home Insurance Company in the following amounts:

(a) Principal Amount of Complaint		$75,840.60
(b) Costs		65.00
(c) Interest:	at 6% from 2/8/79 to 6/9/79	1,520.19
	at 8% from 6/9/79 to 4/16/81	5,167.79
	at 10% from 4/16/81 to 5/21/82	8,329.87
	Total	$90,918.45

plus interest at the rate prescribed for judgments by the laws of the State of Hawaii from May 21, 1982 until this Judgment is satisfied.

Dated: June 1, 1982

Helen J. Frye
Judge of the Above-Entitled Court

Appendix D

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In the United States District Court
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Civil No. 79-0159

United States of America, for the use and benefit of
Martin Steel Constructors, Inc.,
Plaintiff,

vs.

Avanti Constructors, Inc., Harvis Construction, Inc.,
Seaboard Surety Company, and The Home
Insurance Company,
Defendants.

Order Granting Motion for Summary Judgment

This matter having come on for hearing before the Honorable Helen J. Frye, District Judge, on Use-Plaintiff Martin Steel's Motion for Summary Judgment on May 21, 1982, at 10:00 a.m.;

And the Court being fully advised in the premises;

It is hereby ordered that Use-Plaintiff Martin Steel Constructors, Inc.'s Motion for Summary Judgment be granted.

Dated:

_____

Judge of the Above-Entitled Court

Office-Supreme Court, U.S.
FILED
JUN 14 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1508

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HARVIS CONSTRUCTION, INC.,
SEABOARD SURETY COMPANY,
and THE HOME INSURANCE COMPANY,
Petitioners,
vs.
UNITED STATES OF AMERICA,
For the Use and Benefit of
Martin Steel Constructors, Inc.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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No. 84-1508

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HARVIS CONSTRUCTION, INC.,
SEABOARD SURETY COMPANY,
and THE HOME INSURANCE COMPANY,
Petitioners,
vs.
UNITED STATES OF AMERICA,
For the Use and Benefit of
Martin Steel Constructors, Inc.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Martin Steel Constructors, Inc., (hereinafter "Martin") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case. The decision is reported at 750 F.2d 759.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Have Harvis Construction, Inc., Seaboard Surety Company, and The Home Insurance Company (hereafter "Harvis") waived the right to challenge the District Court's dismissal of Harvis' counterclaim by failing to appeal said dismissal, or to urge said dismissal as error, before the Ninth Circuit?

2. Even if the dismissal of Harvis' counterclaim can be challenged, for the first time, on petition for writ of certiorari, did the District Court err in dismissing Harvis' counterclaim?
3. Did the evidence proffered by Harvis in opposition to Martin's Motion for Summary Judgment raise a genuine issue of material fact regarding Martin's entitlement to judgment?

COUNTERSTATEMENT OF THE CASE

The Statement of the Case contained in Harvis' petition grossly mischaracterizes the procedural posture of the case at the time Judge Frye granted Martin's Motion for Summary Judgment by omitting any reference to the prior dismissal of Harvis' counterclaim against Martin for failure to state a claim upon which relief could be granted—a ruling that Harvis did not challenge in the Ninth Circuit. The procedural history behind the dismissal of Harvis' counterclaim is of critical importance to the merit of Harvis' petition.

Martin filed a Motion for Judgment on the Pleadings (CR 22) against Harvis on Harvis' counterclaim which was heard on January 16, 1981 before District Judge Jesse W. Curtis. Martin argued that Harvis' counterclaim merely alleged that Martin breached its supply contract with Avanti Constructors, Inc. (hereafter "Avanti"), who was in bankruptcy, but the counterclaim did not allege any facts that would state a claim on behalf of Harvis against Martin. Harvis' opposition papers relied exclusively upon federal law, erroneously arguing that Harvis' counterclaim was permitted by the Miller Act itself. (CR 23). At the hearing, Judge Curtis queried Harvis' counsel regarding the legal theory upon which Harvis' counterclaim was based, stating, "I'm anxious to see what theories these pleadings will sustain." (Transcript of hearing of January 16, 1981, page 6). Harvis' counsel responded by stating that, "this Counterclaim was set up as a setoff or offset to the claim that is being brought . . ." (Transcript of hearing of January 16, 1981, page 7). He failed, however, to mention any legal theory to support Harvis' entitlement to this alleged right of setoff.

After taking the matter under advisement, Judge Curtis issued a Memorandum (CR 25) which was filed on January 30, 1981. In his Memorandum, Judge Curtis invoked the doctrine of "equitable setoff," which had not been briefed, and held that, while Harvis' counterclaim was not cognizable at law, that it should "be deemed reformed so as to state a cause of action for setoff." (CR 25 at p. 4). On that basis, Judge Curtis denied Martin's motion.

On March 2, 1981, Martin filed a Motion for Reconsideration (CR 26) which, after further briefing (CR 27, 28), was granted pursuant to Judge Curtis' Memorandum and Order filed April 13, 1981. (CR 29). In this, his final ruling on the matter, Judge Curtis stated:

> While the general contractor might have some equitable claim to offset any damage resulting from Avanti's delays, which in turn were caused by Plaintiffs, such claim may not be enforced where no privity exists, since the Miller Act makes no provision for such action. As Professor Williston states:
>
> > The purpose of the Act is to protect those who furnish labor and materials for public works construction and to insure that they will be paid; the statute was not designed to protect general contractors.
>
> 10 *Williston on Contracts*, Section 1211A (3d ed. 1967).
>
> Particularly on point is *United States ex rel. Johnson v. Morley Construction Company*, 98 F.2d 781 (2nd Cir. 1938), *cert. denied*, 305 U.S. 651(1938), in which Judge Hand explicitly ruled that neither a prime contractor nor his surety could counterclaim against a non-privity supplier who sued on the performance bond by federal statute. *See also, United States use of A & W Concrete & Building Materials, Inc. v. Johnson Contractors, Inc.*, 225 F.Supp. 727 (E.D. La. 1964). (CR 29 at p. 3).

On June 4, 1981, Harvis filed a Notice of Appeal (CR 32) from Judge Curtis' ruling, which was dismissed for lack of jurisdiction since Martin's claim remained pending. (CR 40). Harvis then filed a Motion for Leave to File a First Amended

Counterclaim or, in the Alternative, to Revise Judgment of Dismissal to Include Leave to File Amended Counterclaim. (CR 44). This motion was heard and denied by Magistrate Thomas P. Young on January 14, 1982. (CR 47).

It was against the foregoing background that Martin's Motion for Summary Judgment was heard on May 21, 1982 before District Judge Helen J. Frye. Martin's motion was based upon the affidavit of its principal, Harold M. Martin, which averred that the materials called for in Martin's contract with Avanti were delivered to the job site as evidenced by bills of lading and receipts attached as exhibits to his affidavit.

Harvis opposed Martin's motion on the basis of the affidavit of Clark B. Morgan, Jr. (hereafter "Morgan") who averred that Martin had breached its contract with Avanti by:

(a) Delays in delivery of items to be embedded in concrete and major fabricated structural steel members.
(b) Improper marking and sorting of embedded parts and structural steel which required that these pieces be sorted in Hawaii.
(c) Inaccurate bills of lading.
(d) Items not galvanized, which required that they be galvanized and worked on in Hawaii.
(e) Misfabricated and bent parts and broken welds. (CR 49).

Morgan further averred that, as a result of the foregoing alleged breaches by Martin of its contract with Avanti, construction was delayed. Morgan did not, however, state that delivery of any of the materials was rejected, or that acceptance of any of the materials was revoked. Nor did he aver that any of the allegedly defective materials were replaced at the expense of Harvis as erroneously stated by Harvis on page 2 of the petition.

During argument before Judge Frye, counsel for Harvis admitted that the materials at issue were incorporated into the project:

> The pieces were incorporated, but not until much later, until the project had been delayed, other trades had been delayed, other subcontractors delayed.

Judge Frye then queried counsel further on this point:

> But, you didn't—your client didn't reject it when it was delivered late or when it was delivered without the proper pieces and so forth.

Counsel for Harvis responded:

> . . . as far as rejection, these were specially fabricated goods and as far as rejecting them, that would have further delayed the project and further subjected Harvis and Avanti to damages. (Transcript of hearing of May 21, 1982, pages 13-14).

Thus, Harvis did not contend below that any of the materials which Martin sought payment for on the basis of the affidavit of Harold M. Martin had been rejected. Harvis contended only that Martin's alleged breaches of contract delayed construction.

Judge Frye then, very astutely, inquired of Harvis' counsel:

> If I don't grant the motion for summary judgment, though, wouldn't it really be in conflict with the order of Judge Curtis which dismissed both the counterclaims? (Transcript of hearing of May 21, 1982, pages 22-23)

Counsel for Harvis apparently misunderstood Judge Frye's question, thinking she was referring to the ruling of District Judge Claiborne granting a motion for summary judgment made by Use-Plaintiff Inryco, Inc. in a related case, Civil No. 79-0348 in the United States District Court for the District of Hawaii. Counsel for Harvis then responded:

> That order is on appeal to the Ninth Circuit at this time, Your Honor, and we would expect—well, we're optimistic about the appeal. But, yes, Your Honor's decision would be in conflict, but for the fact that the actions of Martin Steel as far as noncompliance with their contract were much more egregious than those of [INRYCO] which is in the other case. (Transcript of hearing of May 21, 1982, page 23).

Judge Claiborne's ruling was indeed the subject of a Notice of Appeal[1] but, as already noted, Harvis' appeal from Judge Curtis' dismissal of Harvis' counterclaim, to which Judge Frye

[1] The case decided by Judge Clairborne was subsequently settled.

was directing her question, had already been dismissed as premature. In any event, Harvis' counsel offered no answer to Judge Frye's pointed question regarding whether Judge Curtis had, in effect, already ruled that Harvis had no claim against Martin for having allegedly delayed either Harvis' or Avanti's performance. Judge Frye accordingly granted Martin's motion for summary judgment. (CR 55).

On appeal to the Ninth Circuit, Harvis chose not to challenge either the propriety of Judge Curtis' dismissal of Harvis' counterclaim or Magistrate Young's denial of Harvis' motion for leave to file an amended counterclaim. Instead, Harvis took the position that Judge Frye erred in granting Martin's motion for summary judgment given the then existing state of the record. Harvis did not include Judge Curtis' April 13, 1981 Memorandum and Order, or any of the motions or memoranda pertaining to the dismissal of Harvis' counterclaim, in its Excerpt of Record as would have been required by Rule 13(a)(1) of the Rules of the United States Court of Appeals for the Ninth Circuit if Harvis had intended to place Judge Curtis' decision in issue on appeal[2].

When Martin then argued, in its Answering Brief, that Harvis had waived the right to contest the correctness of Judge Curtis' ruling, Harvis essentially *agreed*, arguing only that Judge Curtis' dismissal of Harvis' counterclaim did not dispose of Harvis' alleged right of set-off—not that Judge Curtis' ruling was incorrect. Appellant's Reply Brief, pp. 1-3. Accordingly, the Ninth Circuit did not consider the correctness of Judge Curtis' dismissal of Harvis counterclaim to be in issue, stating:

> Although Avanti's trustee in bankruptcy may have a contract action against Martin for alleged breach of their contract, the district court, Judge Curtis, ruled that Harvis does not have such a claim against Martin because there is no privity of contract between Harvis and Martin. *This was*

[2]Rule 13(a)(1) of the United States Court of Appeals for the Ninth Circuit is reprinted in Appendix B to this brief.

determined in the dismissal of Harvis' counterclaim, which is not on appeal in this action.

750 F.2d 759 at 762 (emphasis added).

The question decided by the Ninth Circuit, therefore, was the same question decided by Judge Frye, *viz.*, was Martin entitled to judgment as a matter of law on the then existing state of the record? Both Judge Frye and the Ninth Circuit answered this question in the affirmative—not based upon Louisiana law as alleged in Harvis' petition—but based upon Harvis' failure to raise a genuine issue of fact material to the elements of Martin's *prima facie* case.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Harvis Waived The Right to Challenge The Dismissal of Its Counterclaim By Failing to Appeal Said Dismissal Or To Urge Said Dismissal As Error Before the Ninth Circuit

The heart of Harvis' petition is Harvis' contention that it was erroneously deprived of the right to set its delay damages off against Martin's claim for the contract price of materials supplied to Harvis' subcontractor, Avanti. This issue was disposed of by Judge Curtis in his April 13, 1981 Memorandum and Order, which expressly ruled that Harvis lacked standing to assert damages arising out of Martin's alleged breaches of its contract with Avanti as either a "counterclaim" or as a "setoff" against Martin's claim[3].

As recounted in the foregoing Counterstatement of the Case, Harvis neither appealed Judge Curtis' ruling on this point, nor challenged its correctness before the Ninth Circuit. Instead, Harvis contended that Judge Curtis ruled on Harvis' counterclaim—but not on Harvis' alleged right to a "setoff." Since the Ninth Circuit correctly ruled that Judge Curtis' dispo-

[3]Harvis currently favors the appellation of "recoupment," which does not affect the underlying substantive issue of whether a claim is stated. The Hawaii cases cited for the "Doctrine of Recoupment" were first raised in Harvis' Petition for Rehearing to the Ninth Circuit, and do not address situations where privity is absent.

sition of this issue was "not on appeal in this action,"[4] Harvis has attempted to camouflage its own failure to appeal Judge Curtis' decision by implying to this Court, in its petition, that Judge Frye's order granting Martin's motion for summary judgment was the decision that disposed of Harvis' claimed right of setoff—which is not true.

As stated by this Court on numerous occasions, "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed on below are reviewed." *Duiguan v. United States*, 274 U.S. 195, 200, 71 L.Ed 996, 47 S.Ct. 566 (1977); *California v. Taylor*, 353 U.S. 553, 1 L.Ed 2d 1034, 77 S.Ct. 1037 (1957).

In the case at bar, Judge Curtis dismissed Harvis' counterclaim on April 13, 1981—more than four years ago. In spite of two motions presented to Judge Curtis squarely addressing Harvis' right to assert delay damages in mitigation of Martin's Miller Act claim, Harvis never raised Hawaii Rev. Stat. §490:2-318 or any of the Hawaii case law cited in the petition. Harvis then failed to even cite to the Ninth Circuit, much less appeal, Judge Curtis' decision.

It would be inappropriate for this Court to now review the decision of the Ninth Circuit on the basis of arguments that were not presented to Judge Curtis, whose ruling, in turn, was not properly presented to the Ninth Circuit for review. Otherwise, Harvis will be rewarded for its neglectfulness and Martin may be forced to wait four more years for this case to be resolved through no fault on its part and with no prospect of recovering its attorneys' fees, even if Martin were again to prevail[5].

[4] 750 F.2d 759 at 762.

[5] Per this Court's decision in *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 40 L.Ed.2d 703, 94 S.Ct. 2157 (1974), Martin cannot recover attorney's fees under the Miller Act, even though Martin would have been entitled to recover attorney's fees from Avanti under state law.

2. Even if the Dismissal of Harvis' Counterclaim Can be Challenged, For the First Time, on Petition for Writ of Certiorari, The District Court Did Not Err in Dismissing Harvis' Counterclaim

a) Harvis Did Not Argue Before Judge Curtis That It Was Relying Upon §2-318 Or Any Other Hawaii Law

It its memorandum in opposition to Martin's motion to dismiss Harvis' counterclaim, Harvis relied on federal case law under the Miller Act to support its alleged cause of action. Harvis did not suggest that Hawaii law was applicable and made no reference to Hawaii Rev. Stat. §490:2-318. In his Memorandum of January 30, 1981, Judge Curtis found that the Miller Act did not itself provide a basis for Harvis' counterclaim, citing *U.S. ex rel Johnson v. Morley Construction Co.*, 98 F.2d 781 (2nd Cir. 1938) and *U.S. Use of A & W Concrete & Building Materials, Inc. v. Johnson Contractor, Inc.*, 225 F.Supp 727 (E.D. La. 1964). Since Harvis proffered no other legal basis for its counterclaim, it was correct for Judge Curtis to dismiss it.

Similarly, in Harvis' memorandum in opposition to Martin's motion for reconsideration, Harvis again failed to raise §2-318 or cite any other state law to provide a substantive basis for the counterclaim. Instead Harvis cited federal decisions to the effect that the counterclaim was jurisdictionally proper—a point never disputed by Martin.

b) Even if Harvis Had Raised §2-318 to Judge Curtis, §2-318 Does Not Afford Harvis A Substantive Basis For Its Counterclaim

As correctly stated by Harvis in the petition, Hawaii has adopted Alternative C of §2-318 of the Uniform Commercial Code. Comment number two to the official text states that the intended beneficiaries of the section are the buyer's family, household and guests. Comment number three goes on to point out that, beyond the "family household, and guests of the purchaser" the section is "neutral" and "not intended to enlarge or restrict developing case law on whether the seller's

warranties, given to his buyer who resells, extend to other persons in the distributive chain.''[6] There is no Hawaii case that extends a seller's warranty to buyers, such as Harvis, who are further down the distributive chain.

In its petition, Harvis incorrectly suggests that *Ontani v. Straub Clinic & Hospital*, 66 Haw. 237, 659 P.2d 734 (1983) completely eliminates privity as an element of an action for breach of warranty. Ontani was a personal injury plaintiff hurt by a defective footrest installed on one of Straub Hospital's X-ray tables. Ontani was clearly within the original intent of the statute as a ''guest'' of the purchaser ''injured'' by the seller's breach of its warranty to Straub Hospital. Harvis, on the other hand, was obviously not Avanti's ''guest'' and does not claim to have suffered any personal ''injury.''

Since §2-318 is thus ''neutral'' as to whether Harvis is an intended beneficiary of Martin's contract with Avanti, Harvis must look to Hawaii contract law, which follows the general rule that a general contractor is an incidental rather than intended beneficiary of its subcontractor's contracts. *Tropic Builders, Ltd. v. Naval Ammunition Depot Lualualei Quarters, Inc.*, 48 Haw. 306, 402 P.2d 440 (1965), *See also, Undersea Enqineering & Construction Co. v. International Telephone & Telegraph Corporation*, 429 F.2d 543 (9th Cir. 1970).

3. The Evidence Proferred by Harvis in Opposition to Martin's Motion For Summary Judgment Failed to Raise a Genuine Issue of Material Fact Regarding Martin's Entitlement to Judgment

The showing required in order to obtain summary judgment on a Miller Act claim is well-stated in *United States v. Continental Casualty Company*, 414 F.2d 431 (5th Cir. 1969). In affirming an award of summary judgment to a materialman supplying a subcontractor on a government project, the court stated:

> Several well established principles have emerged from Miller Act cases. It is fundamental that in order for a

[6]Comments 2 and 3 are reprinted in Appendix E to this brief.

> materialman to recover under the Act, it is necessary only that he show that [1] the materials were supplied in prosecution of the work provided for in the contract, [2] that he has not been paid therefore, [3] that in good faith he has reason to believe the materials were intended for the specified work, and [4] that he complied with the jurisdictional requisites.

Id. at 433.

Interestingly, Harvis has apparently abandoned the argument upon which Harvis primarily relied before the Ninth Circuit, *viz.*, that Martin failed to prove its *prima facie* case by establishing, beyond dispute, that its performance was absolutely flawless. Both Judge Frye and the Ninth Circuit correctly rejected the latter contention on the basis that acceptance of materials, without rejection or revocation of acceptance, makes the purchaser liable for the contract price. Hawaii Rev. Stat. §490:2-607. Neither Judge Frye nor the Ninth Circuit held that Harvis could not rely upon the defense that the materials had been rejected by Avanti—which clearly would be proper under Hawaii Rev. Stat. §490:2-602. However, as stated by the Ninth Circuit, "Avanti accepted the materials and they were undisputedly used in the project." 750 F.2d 759 at 761. Hence, absent a cognizable claim by Harvis against Martin for breach of warranty, Martin was entitled to judgment.

CONCLUSION

Harvis bemoans its fate before Judge Frye and the Ninth Circuit as constituting a deprivation of Harvis' day in court. Harvis could have protected itself against Avanti's insolvency, however, by demanding a performance bond or other guaranty of Avanti's performance. Even after Avanti's insolvency, Harvis could have filed a proof of claim with Avanti's trustee in bankruptcy, taken an assignment of Avanti's rights against Martin, or urged Avanti's trustee to pursue such rights, if any[7].

[7]Harvis volunteered to Judge Curtis that it chose not to file a claim with Avanti's trustee. (CR 27).

Having failed to take any of these available steps to protect itself, Harvis should not be heard to complain that it has been deprived of its day in court, especially when Harvis' petition is based on arguments not presented to the district judge and not preserved on appeal to the Ninth Circuit.

Accordingly, Martin respectfully requests that the petition be denied.

Respectfully submitted, this ____ day of _____ _____ , 1985.

_____

RICHARD R. CLIFTON
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Attorneys for Appellee

APPENDIX A

In the United States District Court
for the District of Hawaii

Civil No. 79-0159

United States of America, for the use and benefit of Martin Steel Constructors, Inc.,
Plaintiff,
vs.
Avanti Constructors, Inc., Harvis Construction, Inc., Seaboard Surety Company, and the Home Insurance Company,
Defendants.
[Filed April 13, 1983]

Memorandum and Order

These two actions were filed by use-plaintiffs Martin Steel Constructors and Inryco, Inc., pursuant to the Miller Act, 40 U.S.C. §270a. (1970), to recover payments due and owing them for materials supplied in connection with the United States Government construction contract. Defendants are Harvis Construction, Inc. (prime contractor), Avanti Construction, Inc. (sub-contractor), Seaboard Surety Company and Home Insurance Company (Harvis' bond sureties). Plaintiffs Martin and Inryco supplied materials to Avanti for use in its performance of the government construction contract which ran directly between the U. S. Government and Harvis. In the final analysis, neither of these claimants were paid for the material which they delivered to Harvis by way of the sub-contractor Avanti. Consequently, plaintiffs now sue the defendants in an effort to collect upon the performance bond which Harvis was obliged to secure.

In response to plaintiffs' suits, however, defendant Harvis and his two sureties have asserted a counterclaim against

the plaintiffs alleging that Harvis sustained damages caused by plaintiffs' delay in delivering certain materials to Avanti. Avanti is now insolvent.

Plaintiffs moved for judgment on the pleadings on the ground that, as a matter of law, without privity of contract between these parties, counterclaimants were barred from suing them for damages allegedly caused by a delay in delivering building materials to Avanti, the sub-contractor. This motion was denied by the court on January 20, 1981.

On March 2, 1981, plaintiffs, pursuant to Rules 7(b) and 60(b) of the Federal Rules of Civil Procedure, moved for reconsideration of the court's decision on the ground that it was erroneous.

In opposition to plaintiffs' motion, defendants first argue that the motion is untimely, since it is more appropriately a motion pursuant to Rule 59, which must be filed within ten days after the entry of judgment. But, the defendants are mistaken. This is simply a motion addressed to plenary powers of the court to reconsider an interlocutory order or ruling prior to judgment particularly authorized by Rule 60(b)(6). Under this Rule, plaintiffs' motion is clearly timely.

Upon reconsideration, it appears that this court's earlier order is erroneous and should be withdrawn. It is, of course, an elementary principle that privity is a necessary element of a cause of action on contracts. The Miller Act, however, expressly provides material men, suppliers and subcontractors with a direct cause of action on the performance bond of the general contractor providing they have a direct contractual relationship with a sub-contractor, and also comply with other various statutory requirements, even though privity does not exist. While the general contractor might have some equitable claim to offset any damage resulting from Avanti's delays, which in turn were caused by the plaintiffs, such claim may not be enforced where no privity exists, since the Miller Act makes no provision for such action. As Professor Williston states:

> The purpose of the Act is to protect those who furnish labor and materials for public works construction and to insure

that they will be paid; the statute was not designed to protect general contractors.

10 *Williston on Contracts*, section 1211A (3d ed. 1967).

Particularly in point is *United States ex rel. Johnson v. Morley Construction Company*, 98 F.2d 781 (2nd Cir. 1938), *cert. denied*, 305 U.S. 651 (1938), in which Judge Hand explicitly ruled that neither a prime contractor nor his surety could counterclaim against a non-privity supplier who sued on the performance bond by federal statute. *See also, United States use of A & W Concrete & Building Materials, Inc. v. Johnson Contractor, Inc.*, 225 F. Supp. 727 (E.D. La. 1964).

IT IS THEREFORE ORDERED that this court's order of January 29, 1981 be, and the same is hereby vacated and set aside, and plaintiffs' motion for judgment on the pleading as against the defendants Harvis Construction, Inc., Seaboard Surety Company and Home Insurance Company on their counterclaims be, and the same is hereby granted.

DATED: April 10, 1981

JESSE W. CURTIS
United States District Judge

APPENDIX B
RULE 13(a)(1) OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Briefs

(a) Required Excerpts of Record

(1) Appeals from District Court, Bankruptcy Court, and the Tax Court. At the time of the filing of appellant's brief, the appellant shall file five (5) copies of excerpts of the clerk's record to be bound separately from the briefs. The appellant shall serve one (1) copy of the excerpts on all other parties.

A. Documents from clerk's record. The excerpts shall include the following and no other documents from the clerk's record:

(i) the petition or complaint and answer and, in criminal cases, the indictment;

(ii) the pretrial order, if any;

(iii) the judgment or interlocutory order from which the appeal is taken;

(iv) other orders sought by be reviewed, if any;

(v) any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the trial court (citations if opinion is published);

(vi) the motion and response upon which the court rendered judgment, if any;

(vii) the notice of appeal;

(viii) the parties' stipulation to a direct appeal to the U.S. Court of Appeals if the appeal is taken directly from a decision of the U.S. Bankruptcy Court, or the parties' written consent to trial before a U.S. Magistrate;

(ix) any certification by the district court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure or 28 U.S.C. §1292(b);

(x) any order of the district court under Rule 4 of the Federal Rules of Appellate Procedure extending the time for filing the notice of appeal; and

(xi) the trial court docket sheet.

Although not all the above-listed requirements are applicable to each case, each excerpt must contain at minimum items i, iii, vii, and xi. If the appellee believes that the excerpt filed by the appellant fails to include any of the required documents, exhibits, or pages of the reporter's transcript, the appellee may either file at the time its brief is filed a supplemental excerpt containing those documents, or may move for an order directing the appellant to supplement the excerpt with the necessary documents, exhibits, or pages of the reporter's transcript.

The trial court docket sheet shall always be the last document in the excerpt; it shall be placed after any parts of the reporter's transcript or exhibits included in the excerpt.

B. Reporter's transcript. When an appeal is based upon a challenge to the admission or exclusion of evidence, the giving or failure to give a jury instruction, or any other ruling or order, a copy of the pages of the reporter's transcript at which the evidence, offer of proof, instruction, ruling, or order and any necessary objection are recorded must be included. It is intended that the number of pages reproduced from the reporter's transcript be strictly limited to those absolutely essential for review.

C. Exhibits. When a claim or defense is based on a written exhibit, the relevant parts of the exhibit shall be included in the excerpt.

APPENDIX C

Hawaii Rev. Stat. §490:2-602

Manner and effect of rightful rejection. (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (sections 490:2-603 and 490:2-604),

(a) After rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) If the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of section 490:2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) The buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on seller's remedies in general (section 490:2-703). [L 1965, c 208, §2-602]

APPENDIX D

Hawaii Rev. Stat. §490:2-607

Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for nonconformity.

(3) Where a tender has been accepted

(a) The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) He may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) If the claim is one for infringement or the like (subsection (3) of section 490:2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to

bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of section 490:2-312). [L 1965, c 208, §2-607]

APPENDIX E

Comments 2 and 3 to Hawaii Rev. Stat. §490:2-318

2. The purpose of this section is to give the buyer's family, household and guests the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller's warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.

3. This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.